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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

1950

No. 345

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

HAROLD E. SPENCER,
ROBERT H. BIERMA,
HARRY E. BOE,
CHARLES CLARK,
FRANK H. COLE, JR.,
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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs, The Alabama Great Southern Railroad Company, et al., submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court entered herein on January 12, 1950. A petition for appeal is presented to the District Court herewith, to wit, on March 7, 1950.

Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and

order of the District Court entered in this case is conferred by Title 28, United States Code, sections 1253, 1336, 2101(b), 2284, and 2321-2325, inclusive, effective September 1, 1948, 62 Stat. 928, 931, 962, 968, 969-970.

Cases Sustaining Jurisdiction

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567;

Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658;

United States v. *New York Central R. R.*, 263 U. S. 603.

Statutes Involved

This appeal involves the interpretation of the following statutory provisions:

Section 307 (d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907 (d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to the charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail

rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, preceding section 1 of the Interstate Commerce Act [49 U. S. C. § 1], which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3 (c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153 (c)], which reads in part as follows:

> "It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as

shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . . "

Other provisions of the Interstate Commerce Act are also incidentally involved.

Nature of the Case and the Ruling of the District Court

This action was brought by plaintiffs who are common carriers by railroad, on behalf of themselves and all other common carriers by railroad similarly situated, to set aside, annul, suspend, and enjoin an order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates,* No. 26712 on the Commission's docket.

Acting pursuant to the authority conferred on it by section 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980,[1] the Commission, without a hearing, in 1929, granted to the Inland Waterways Corporation operating the Federal Barge Lines (hereinafter referred to as Federal) a certificate of public convenience and necessity and established through routes and joint barge-rail rates between Federal and the rail carriers. It also established differentials between all-rail rates and the barge-rail rates, subject to certain limitations.[2] 153 I. C. C.

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[1] Repealed by section 320(e) of the Interstate Commerce Act, added by section 201 of the Transportation Act of 1940, 54 Stat. 950 [49 U.S.C. § 920(e)].

[2] The Commission devised a formula, commonly referred to as the Ex Parte 96 formula, for determining differentials, which was designed to limit differential joint barge-rail rates to routes which would not be unduly circuitous and over which the barge line's portion of the haul would not be so short that the interchange expense would offset the assumed economies of water transportation. Within these limitations, the joint-barge-rail rates were determined by deducting from the lowest all-rail rate on the traffic involved from origin to destination an indicated percentage (generally 20%) of the lowest corresponding all-rail rate between the ports between which the shipment was transported by barge.

129. Similar action was taken in 1930 in connection with the Mississippi Valley Barge Line Company (hereinafter called Valley) and in 1932 in connection with the American Barge Line Company (hereinafter called American). 167 I. C. C. 41, 182 I. C. C. 521. Federal is a corporation and agency of the United States Government, operating under the Secretary of Commerce. Valley and American are privately owned and operated.

On September 7, 1934, the railroads filed three formal complaints with the Commission attacking the lawfulness of the differentials which the Commission had prescribed without a hearing. At the same time, a petition was filed seeking reopening of certain other proceedings in which differentials had been prescribed. The Commission thereupon, by order dated October 8, 1934, instituted a general investigation, *Rail and Barge Joint Rates*, Docket No. 26712, among other things, into the lawfulness of the existing joint barge-rail rates and differentials. It consolidated for disposition with the general investigation the three formal complaints filed by the railroads and certain other proceedings involving the same general questions.

During the course of the hearings before the Commission, the rail carriers undertook by extensive evidence to show that the cost of transporting freight via the barge-rail routes was not less than the cost of transporting freight via the all-rail routes and that, contrary to the view theretofore widely held, the all-rail routes were in fact far more economical than the barge-rail routes. The barge lines also presented evidence relating to their own costs of operation.

All of the cost evidence, approximately one-fourth of the entire record, was referred for study to the Cost Section of the Commission's Bureau of Transport Economics and Statistics, and at one of the hearings a restatement of rail

and barge cost data with supporting details was introduced in evidence by members of the staff of the Commission's cost section, who reached the general conclusion, quoted by the Commission in its report, that

> ". . . the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic." 270 I. C. C. at 604.

The Commission entered its report on July 7, 1948 [3] 270 I. C. C. 591. Because of changes in conditions which had taken place subsequent to the period 1933-8 covered by the cost studies, the Commission did not make a specific finding of the relative all-rail and barge-rail costs during the period 1933-8. On the whole record, however, the Commission did make the following finding:

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrier, which from the standpoint of cost of service would justify differentials." 270 I. C. C. at 606.

The Commission then discussed congressional policy with respect to water transportation as justification for differentials and, in spite of the finding just referred to, concluded that differentials between all-rail and barge-rail rates were "justified," [4] making the following ultimate finding:

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[3] The Commission also, on June 13, 1949, entered a supplemental report, 274 I.C.C. 229.

[4] The Commission prescribed specific differentials, in cents per 100 pounds, to be deducted from first-class all-rail rates to determine joint first-class barge-rail rates between a great number of key points throughout the United States. These differentials are set forth in appendices to the Commission's report, 270 I.C.C. at 622-641.

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified." 270 I. C. C. at 613.

Believing that the Commission had misconstrued the law and its own statutory power, that the reasons assigned by the Commission as justification for imposing differentials on the all-rail routes were not legally sufficient to support its action, and that the Commission's order was not supported by proper findings and evidence, plaintiffs filed their complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On January 12, 1950, the Court entered an opinion, findings of fact, conclusions of law, and a final decree dismissing the complaint. The Court held that the Commission had not misconstrued the law as contended by plaintiffs and that the Commission's order was supported by proper findings and evidence. A copy of the Court's opinion, which has not yet been reported, is appended hereto.

The Questions Involved Are Substantial

This is the first time that the Supreme Court has been called upon to construe section 307 (d) of the Interstate Commerce Act with respect to the extent of the Commission's power to establish differentials between all-rail and barge-rail rates.[5]

[5] In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, at 574, 577, the Court referred to section 307(d) of the Act but the power of the Commission to establish joint barge-rail rates and differentials was not there directly involved.

Prior to the institution of this proceeding, the Commission established many differentials on the assumption that barge-rail service was inherently cheaper than all-rail service.[6] The rail carriers proved in this case that such an assumption was false. Yet the Commission, in spite of finding no economies in the barge-rail service to justify differentials, concluded that differentials were justified on considerations of congressional policy, apparently without regard to the substantive provisions of the Interstate Commerce Act. Furthermore, although the Commission made a finding in the language of the statute that the differentials it prescribed "are justified as reasonable differentials" (270 I. C. C. at 619), it made no finding—nor could it have so found from the evidence—that the resulting joint barge-rail rates were just and reasonable rates. Nor did it make any preliminary or subsidiary findings on which such an ultimate finding of reasonableness could be based. Except for allusions to the inferiority of the barge-rail service, it assigned no transportation circumstances or conditions as justification for the differentials. Consequently, it is especially important at this time for the Supreme Court to determine whether the Commission may deprive rail carriers of traffic which they normally carry and give it to their com-

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[6] See, for example, *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528, 546-7, where the Commission said: "The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper. In view of this difference in cost and value, the portion of the rail-barge-rail joint rate applicable to barge-line service may reasonably be less than the corresponding portion of the all-rail joint rate applicable to intermediate rail service."

See, also, *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126, 144, where the Commission said: "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

petitors, in complete disregard of the evidence showing that the rail carriers are economically best fitted to handle the traffic and in disregard of the specific limiting standards of the Interstate Commerce Act.

This appeal, therefore, presents several questions of substantial importance to rail carriers, barge carriers, and shippers alike. There is here presented the question whether, in the face of a finding that differentials between all-rail and barge-rail rates cannot be justified by any demonstrable economies in the cost of barge-rail service, the Commission may nevertheless, under section 307(d) of the Interstate Commerce Act, establish such differentials on the theory that they are required by congressional policy with respect to water transportation in the Mississippi Valley. There is also presented the question whether the Commission may establish differentials in favor of barge-rail transportation to offset the lower value of its inferior service and thus give it a rate advantage over the superior service without also finding that the cost of rendering the joint barge-rail service is less than the cost of rendering the corresponding all-rail service. The Court is also called upon to decide whether joint barge-rail rates may be established without a finding that such rates are *per se* just and reasonable.

The order of the Commission will require the establishment of a new system of differential joint barge-rail rates throughout practically all of the United States east of the Rocky Mountains. It is estimated that some 3,000 common carriers by railroad are required by the Commission's order to join in these barge-rail rates and thus to give up to their barge competitors a substantial amount of their traffic.

Important questions relating to the national transportation policy not heretofore passed on by the Supreme Court are also presented by this appeal. Although the Commis-

sion, on the record before it, could find no demonstrable economies in barge-rail transportation which would justify differentials, it said that to recognize the railroads' contention that they have the inherent advantage of lower cost of service "would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611. If the Commission is now free to disregard cost of service evidence and to ignore the inherent advantage of the lower cost of service of the rail carriers, as the District Court says it is, then the rail carriers are completely at the mercy of the arbitrary discretion of the Commission. They must give up their traffic to their competitors on whatever basis the Commission may choose to impose on them without any regard to the evidence before it and without any regard to transportation circumstances and conditions. Such, we believe, is not the law.

In this respect, the decision of the District Court is inconsistent with the decision of the Supreme Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. We understand the holding in that case to be that the conceded lower cost of the barge carrier there involved was an inherent advantage which the Commission must recognize and preserve. The Court there said:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition." 330 U. S. at 579.

If it is not within the province of the Commission to protect the traffic of railroads from barge competition, then it certainly is not within the province of the Commission to protect the traffic of the barge carriers from rail

competition when that competition results from the ability of the rail carriers to render a superior service at lower cost. To hold otherwise would be the clearest sort of violation of the policy of Congress "to provide for fair and impartial regulation of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each; . . ."

The reliance of the District Court on the *Mechling* case and the argument of the defendants that the *Mechling* decision compels the Commission to establish differentials in favor of the barge carriers without regard to cost evidence completely disregards the fundamental factual difference between the cases. In the *Mechling* case, the Commission had found the rates of the barge carrier to be reasonable, and this determination was accepted by the Court.[7] The Court also assumed that the rail rates west of Chicago, which were competitive with the barge carrier involved, were "fair and reasonable for the services performed." 330 U. S. at 582. Thus, the reasonableness of the barge rates, the reasonableness of the rail rates which were competitive with the barge rates, and, consequently, the reasonableness of the difference between them were all accepted by the Court as having been established, and the question was whether the rail carriers east of Chicago could charge higher rates for carrying ex-barge grain than for carrying ex-rail or ex-lake grain between the same points.

In the present case, on the contrary, the intrinsic reasonableness of the joint barge-rail rates and the reasonableness of the differentials between them and the all-rail rates are the very facts at issue, for the determination of which

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[7] See footnote 10, 330 U. S. at 578, where the Court said: "The Commission stated that 'The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding may be accepted as reasonable.' 262 I.C.C. 7, 19."

the Commission instituted its investigation in *Rail and Barge Joint Rates.* The Commission found that there were no economies in the barge-rail service to justify differentials, but it refused to carry that finding into effect. But, under the Act, the Commission must recognize and preserve the inherent advantages of all modes of transportation. How can it discharge this duty without considering relative fitness and economy? If the Commission can ignore relative cost of service, it is difficult to imagine any other evidence that it must consider. Thus, the necessary consequences of the Commission's interpretation of section 307 (d) of the Act reduce that interpretation to an absurdity.

In this case, the Commission also fell into the same error as it did in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, and *United States* v. *New York Central R. R.,* 263 U. S. 603, and its order here is invalid for the same reason as the orders involved in those cases were held to be invalid. In this respect, there is no substantial difference between this case and the *Ann Arbor* case. Here, as in that case, although the Commission's ultimate findings are worded in the language of the statute, its report clearly shows that the motivation of the Commission was really its interpretation of Congressional policy and not a belief that the evidence before it showed that the differentials were justified or that the joint barge-rail rates were just and reasonable from a transportation standpoint.

This appeal also presents a question of substance with respect to what findings are required to support orders of administrative agencies. The District Court held that "the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the 'quasi-jurisdictional' findings which the Supreme Court has declared essential." Such

a holding does not comport with the standards as to necessary basic and essential findings in *Eastern-Central Ass'n* v. *U. S.*, 321 U. S. 194, and *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. The power conferred on the Commission by section 307(d) of the Interstate Commerce Act is not an arbitrary one to be exercised wholly within the discretion of the Commission so long as it makes the ultimate finding required by the statute. It is a power to be exercised in consonance with all the substantive provisions of the Act and only after preliminary and subsidiary findings show that the evidence before the Commission discloses a rational basis in fact for exercise of the Commission's power.

It is believed, therefore, that the questions presented by this appeal are substantial and that they are of vital public importance.

Respectfully submitted,

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Dated, March 7, 1950.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, el al., Plaintiff

v.

UNITED STATES OF AMERICA, et al., Defendant

Before Lindley, Circuit Judge; Sullivan and Igoe, District Judges

LINDLEY, Circuit Judge:

This is an action to set aside and enjoin the order of the Interstate Commerce Commission entered in a proceeding entitled *Rail and Barge Joint Rates, No. 26712.* The Commission, by order of October 8, 1934, instituted this proceeding as a general investigation into the lawfulness of differentials then existing between all-rail rates and barge-rail rates, established by the Commission in the three years from April, 1929, to March, 1932. In the course of extensive hearings during the ensuing eight years, more than 16,000 pages of testimony and over 1,500 statistical exhibits were received in evidence. Upon conclusion of the hearings, an examiner submitted a report, to which exceptions and replies were filed by all interested parties. Following oral argument before the entire Commission, that body, on July 7, 1948, issued its report and order, which, as modified and corrected by its supplementary report of June 13, 1949, required common carriers by rail and water to establish joint rates over certain through routes specified in the report, these joint rates to be based upon the differentials prescribed in said report. Plaintiffs contend that the order is arbitrary and beyond the Commission's authority, and urge

that it be set aside and its enforcement perpetually enjoined.

A brief history of the controversy which lies at the root of this cause may be of some assistance in its resolution. The Federal Control Act of March 21, 1918, which directed the Railroad Administration to establish water transportation on certain inland waterways, was the first step in the attempted revival of water transportation on the Mississippi River and its tributaries, and the Warrior River. Before any conclusive evidence relative to the propriety of this undertaking was obtained, the war had ended, but Congress, in the Transportation Act of 1920, provided for continuation of the Mississippi-Warrior barge line service, directing that its operations be under the control of the War Department. Four years later, Congress created the Inland Waterways Corporation, of which the Secretary of War was the sole incorporator, and transferred to it the direction of this enterprise. This arrangement persisted until July 1, 1939, when supervision of the Inland Waterways Corporation, operator of the Federal Barge Lines, passed to the Department of Commerce. Meanwhile, privately owned and operated common carriers by water had become active on the Mississippi, and this fact impelled Congress to include in the Transportation Act of 1940 (Part III of the Interstate Commerce Act) a comprehensive plan for regulation, by the Interstate Commerce Commission, of all water carriers engaging in interstate commerce, this legislation having as its declared purpose the preservation of the inherent advantages of each mode of transportation through the impartial regulation of all.

In 1918, the Director General of Railroads, recognizing that shippers would not avail themselves of the slower, more hazardous barge service unless the barge rates were lower than the all-rail rates between the same points, determined that the port-to-port rates should be 80% of the all-rail rates between the same ports, and that the same differential should be applied to shipments moving through the same ports over joint rail-barge routes. This rate system was put into effect over certain through routes

designated by the Director General. After 1920, when the War Department took control of Federal Barge Lines, unsuccessful attempts to persuade the railroads to enlarge the existing joint-rate structure culminated in the filing of a complaint with the Interstate Commerce Commission, in which Federal asked the Commission to prescribe joint rail-barge rates over a number of routes suggested by Federal. The Commission, observing that many of the proposed routes were unduly circuitous and that there was insufficient evidence to enable it to determine which, if any, of the others should be established, suggested that joint rates over some of the routes might better be established through friendly negotiations with the rail lines. Some new joint rates were fixed in that fashion, but the results were, on the whole, so unsatisfactory that Congress, in 1928, passed the Denison Act, which directed the Commission to issue certificates of public convenience and necessity to common carriers by water on the Mississippi, the Warrior, and their tributaries, and, in the event the railroads refused voluntarily to establish through routes and joint rates with such carriers, authorized the Commission to establish such routes and rates and to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service."

The Commission, acting under the authority conferred on it by this act, granted certificates of public convenience and necessity to Federal Barge Lines, Mississippi Valley Barge Line Company, and American Barge Line Company, and announced the so-called Ex Parte 96 formula for determining whether additional through routes proposed by the barge lines should be established. This formula, which was designed to avoid the establishment of through routes which would be unduly circuitous or over which the barge line's portion of the joint haul would be so short that the interchange expense would offset the assumed economies of water transportation, provided that the joint rates over the routes which were established should incorporate the 20% differential first adopted by the Director General in 1918, except that, for such routes as

barely met the distance requirements of the formula, the differential should be only 10% of the all-rail port-to-port rate. Railroad complaints attacking the reasonableness of the rates and differentials fixed pursuant to the Ex Parte 96 formula led the Commission to undertake the general investigation out of which the present controversy arises.

At the outset of this proceeding the railroads announced their intention of showing that, contrary to popular belief, the cost of transporting freight over barge-rail routes was not less but, on the contrary, actually more than the cost of transporting it all-rail. The barge lines insisted that this was not true. Both sides introduced voluminous evidence relative to their respective costs of service, all of which was referred by the Commission to its cost section for study and interpretation. Although the cost section concluded generally that the cost of joint rail-barge shipping was greater than that incurred in direct all-rail routing and that this was due chiefly to the added terminal handling involved in joint rail-barge traffic, the Commission declined to review this conclusion or to make any finding as to relative all-rail and barge-rail costs in the period covered by the cost studies (1933-1938) because, as it said, "since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail." The Commission did state that "we cannot find that at the present time there are demonstrable economies in barge-rail transportation * * * which from the standpoint of cost of service would justify differentials." However, the Commission felt that the proviso, in Section 307(d) of the Transportation Act of 1940 (49 U. S. C. A. 907(d)), that "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water," did not mean, as the railroads contended, that proof of lower cost of barge-rail service was a necessary condition precedent to the exercise of its authority to prescribe differentials between all-rail and barge-rail rates, and, finding that the differentials set

forth in the appendix to its report, were "justified as reasonable" and "necessary and desirable in the public interest," it ordered the railroads and the barge lines to establish joint rates based on such differentials. These differentials, it might be observed, do not result in the establishment of a wholly new system of joint barge-rail routes and rates; they are, rather, revisions of and additions to the rate structure created under the Ex Parte 96 formula, which was in effect when the Commission's general investigation was initiated.

The position of the plaintiffs, in short, is that, because the Commission could find no demonstrable economies in the barge-rail service which, from the standpoint of cost of service, would justify differentials, there is no legal basis for the Commission's order, based, as they say, solely on its belief that the order is in accord with Congressional intent and policy. They urge that the order, far from carrying out the intent of Congress, violates the national transportation policy, as declared in the Transportation Act of 1940, by depriving the railroads of their inherent advantage of lower cost of service and giving to the water carriers advantages to which they are not entitled on their merits and which Congress did not intend them to have. Finally, the plaintiffs contend that the order is not supported by basic findings of fact, and that this failure to disclose the basis on which the differentials were determined renders it arbitrary and unlawful. The United States, the Commission, and the intervening barge line defendants contend that the order is fully supported by findings based on substantial evidence and that it is in accord with Congressional policy and within the statutory authority of the Commission.

Plaintiffs, asserting that by the Commission's own rule, the basis for barge-rail differentials is that the service costs less and is worth less than rail service, argue that, because the Commission found no economies in barge-rail transportation which from the standpoint of cost of service would justify rate differentials, it was precluded from prescribing such differentials. That the Commission has, on numerous occasions, stated that the lower cost and lower value of

water transportation provide the basis for the existence of rate differentials cannot be doubted. Inland Waterways Corp. *v.* Alabama Great Southern R. Co., 151 I.C.C. 126, 144, Inland Waterways Corp *v.* Aberdeen & R. R. Co., 183 I.C.C. 761, 765, but it has never indicated that proof of lower cost of service is an absolutely essential condition for creation of such differentials. Moreover, it is not at all clear that the lesser cost of the service, which is characterized as "the important factor," from the standpoint of public policy, on which rate differentials are based, means lower *operating costs;* rather does it seem more likely that the phrase means lower *costs to the public.*[8] And finally, plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

In the instant case, assuming that the operating costs of the railroads are less than those of the barge lines, it does not follow that joint barge-rail rates should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service. More important, then, than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carrier and the operating costs incurred by the water carriers. So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the

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[8] Footnote: In *I.C.C.* v. *Mechling*, 330 U. S. 567, 580, the Supreme Court said: "* * * Congress knew that barge line rates were cheaper than rail rates, wanted the shippers to get full benefit of them, and left the Commission no power to take that benefit away from shippers by adjusting rail-barge traffic competition or rates."

rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service. Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i.e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist.[9] In the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

The statutory provision empowering the Commission to prescribe differentials (Section 307(d) of the Transportation Act of 1940) does not make the exercise of this power conditional on an affirmative showing of lower operating costs, but directs that "* * * the Commission shall prescribe such reasonable differentials as it may find to be justified * * *." As the Commission stated in its report, "Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is * * * an affirmative showing (of lower operating costs)."

Plaintiffs' contention that the order is not supported by basic findings of fact but is based solely on the presumed intent of Congress, and that it is, consequently, an arbitrary act without any legal basis must also be rejected. Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission. It was fully cognizant of the inferiority of the service afforded by the barge lines,[10] a factor which it had previously designated as one basis for barge-line differen-

[9] Footnote: Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor.

[10] Footnote: On page 608 of its report, the Commission stated: "Much evidence was presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail. The principal disadvantage is the longer time involved. * * * Transfer of shipments from

tials. Inland Waterways Corp. *v.* Alabama Great Southern R. Co., 151 I.C.C. 126, 144. It regarded the shippers' evidence as "of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense," and, aware that the abolition of differentials would end all barge-rail traffic, concluded that, in the light of the "clear Congressional policy" of aiding and encouraging the development of water transportation on the Mississippi and its tributaries, "joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

Turning to the prescription of specific differentials, plaintiffs assert that it is impossible to determine how they were arrived at, but, again, the Commission's report indicates otherwise. Comprehensive proposals for the establishment of differentials were under consideration by the Commission, which, while expressing its belief that "the requirement that the barge line absorb the differential in its division of the joint rate in and of itself provides some measure of safe-guard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, "rejected certain differentials proposed by the Missippi Valley Association because they "would be much too low to permit the barge lines to absorb the differentials without serious revenue effect." Weighing the merits of the various proposals, it found that Federal's proposal was "conservative with respect to the measure of the differentials;" and, pointing to Federal's experimental status, it concluded that "Federal should not be compelled to accept a lower level of joint rates than it considers necessary in the absence of evidence that its proposed rates would be unreasonably high." Although indicating that the Ex Parte 96 formula would not be rigidly adhered to because it had, in the past, produced "some unsatisfactory port relations and other inconsistencies," the Commission declared that

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barge to railroad car or vice versa increases freight damages. • • • In the case of some commodities, barge transportation to some extent is conducive to deterioration or shrinkage on account of the slow transit, or contamination through contact with other freight."

"the circuity and relative-service restrictions in the formula are sound in principle" and rejected certain routes proposed by Valley because they were excessively circuitous.

From the foregoing discussion, it would seem apparent that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject. As the Supreme Court said in Ayrshire Collieries Corp. v. United States, 335 U. S. 573, 592, "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance, and competition differently than the Commission has done in this case. That is a task peculiarly for it. * * * The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked."

Plaintiffs, however, insist that the statutory requirements have not been met in this case,—that the order is not supported by basic findings of fact and that, contrary to the provisions of Section 307(d) of the Transportation Act of 1940, it deprives the railroads of their inherent advantage of lower operating costs. Section 14(1) of the Interstate Commerce Act, 49 U.S.C.A. 14 (1), provides: "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." This statute would seem to provide the conclusive answer to plaintiffs' charge that the order is invalid because not supported by basic findings of fact, for it indicates that, except where damages are awarded,

the report need not contain findings of fact expressly labelled as such. Here, subsequent to its investigation, the Commission made a "report in writing," setting forth its "conclusions" that barge-rail differentials, as prescribed, were reasonable, were justified, and were necessary and desirable in the public interest, together with its "order." Although the formal findings consisted only of findings of ultimate facts, the Commission's report, as has been pointed out, discloses that those ultimate conclusions have ample support in the evidence and in informally stated findings contained therein. The Supreme Court, recognizing that Section 14(1) of the Interstate Commerce Act, relieves the Commission from making "comprehensive" findings of fact, has held that an order of the Commission is valid if supported by what it called "quasi-jurisdictional" findings, Florida v. United States, 228 U. S. 194, United States v. Baltimore & Ohio R. R. Co., 293 U.S. 454; here, the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the "quasi-jurisdictional" findings which the Supreme Court has declared essential.

The railroads' contention that the order deprives them of their inherent advantage of lower operating costs rests, of course, on the premise that the cost of shipping all-rail is, in fact, less than the cost of shipping barge-rail. However, in view of the fact that the cost information before the Commission was some ten years old, it seems obvious that the Commission was not required to find, on the basis of that evidence, that all-rail costs are lower than barge-rail costs; and, that the rail-roads' cost data was obtained by the use of average system costs based on the total freight traffic carried by the respective railroads and did not purport to represent the actual costs incurred in transporting barge-rail freight over the routes in question strengthens this conclusion. Baltimore & Ohio R. R. Co. v. United States, 298 U.S. 349, 380-381. The Commission, apparently of the opinion that the cost evidence before it was inadequate to support any affirmative find-

ing as to relative costs,[11] was, however, faced with certain obvious facts,—the sharp decline in joint barge-rail traffic in recent years, the high operating costs and ensuing financial difficulties encountered by Federal which, operating with outmoded equipment, both terminal and floating, was the only one of the major barge lines to haul an appreciable amount of joint barge-rail freight, the virtual embargoes imposed on such freight by the financially sound and better equipped Valley and American lines, all of which led it to state that "In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation • • • which from the standpoint of cost of service would justify differentials." Such a negative conclusion, we think, cannot be said to constitute an affirmative finding that all-rail costs are lower than barge-rail costs; in the absence of such a finding, and in the absence of evidence requiring such a finding, the argument that the order deprives the railroads of the inherent advantage of lower costs must be rejected, for plaintiffs have failed to establish the premise on which the argument is based.

The position of the intervening complainants is that the order violates Sections 1 and 3 of the Interstate Commerce Act in that it gives New Orleans shippers an unjust preference over shippers in Savannah, Houston, and Dallas respectively, by prescribing unreasonably low barge-rail rates, and that it, therefore, violates Article I, Section 9, Clause 6 of the Constitution, which prohibits a preference of the ports of one state over those of another. If the prescribed barge-rail differentials are reasonable and justified as between the barge lines and the railroads, as it seems to us they are, then the contention that the order prescribes unreasonably low barge-rail rates or unduly prefers New Orleans over Savannah and the Texas ports becomes, in effect, a complaint against any rate structure

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[11] Footnote: The Commission's report states that "no useful purpose would be served by reviewing . . . (the cost data) . . . . with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail."

which provides to shippers who are in a position to transport their goods by water, rates which are lower than those available to shippers who are not so located. But it is not the function of the Commission to equalize natural geographic advantages; nor do such advantages constitute undue preferences within the meaning of Section 3 of the Interstate Commerce Act. See Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 46, where the Supreme Court speaking through Mr. Justice Holmes, announced the principle, since adhered to by the Commission, that "The law does not attempt to equalize fortune, opportunities, or abilities."

The contention that the Commission's order violates the ports preference clause of the Constitution is, we think, settled by Commission v. Texas & N. O. R. Co., 284 U.S. 125, 131, in which the court said: "The clause of the Constitution invoked is: 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' The specified limitations on the power of Congress were set to prevent preferences as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States." Moreover, in this case, the preference of which the interveners complain is not given by a regulation of commerce but by a favorable geographic location.

The order of the Commission is sustained and the complaint of the plaintiff railroads, together with the complaints of the interveners, are dismissed.

The findings of fact and the conclusions of law herein set forth are made a part of our more formal findings and conclusions of the same date.

Entered this 12th day of January, A.D. 1950.

WALTER C. LINDLEY,
PHILIP L. SULLIVAN,
M. L. IGOE.